No. 10-1062

IN THE
Supreme Court of the United States

CHANTELL SACKETT AND
MICHAEL SACKETT,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, *et al*.
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMERICAN PETROLEUM INSTITUTE, AMERICAN ROAD & TRANSPORTATION BUILDERS ASSOCIATION, BUILDING OWNERS AND MANAGERS ASSOCIATION INTERNATIONAL, CROPLIFE AMERICA, THE FERTILIZER INSTITUTE, FOUNDATION FOR ENVIRONMENTAL AND ECONOMIC PROGRESS, INTERNATIONAL COUNCIL OF SHOPPING CENTERS, NATIONAL ASSOCIATION OF REAL ESTATE INVESTMENT TRUSTS, NATIONAL ASSOCIATION OF REALTORS®, NATIONAL MINING ASSOCIATION, NATIONAL MULTI HOUSING COUNCIL, AND UTILITY WATER ACT GROUP AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

VIRGINIA S. ALBRECHT
Counsel of Record
DEIDRE G. DUNCAN
RYAN A. SHORES
KARMA B. BROWN
KERRY L. MCGRATH
HUNTON & WILLIAMS LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037
valbrecht@hunton.com
(202) 955-1500
Counsel for Amici Curiae

September 30, 2011

[Additional Counsel Listed on Inside Cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Of Counsel:

PETER TOLSDORF
AMERICAN PETROLEUM INSTITUTE
1220 L Street, NW
Washington, DC 20005
(202) 682-8074

NICK GOLDSTEIN
AMERICAN ROAD & TRANSPORTATION
BUILDERS ASSOCIATION
1219 28th Street, NW
Washington, DC 20007
(202) 289-4434

DOUGLAS T. NELSON
JOSHUA B. SALTZMAN
CROPLIFE AMERICA
1156 15th Street, NW, Suite 500
Washington, DC 20005
(202) 872-3880

RALPH W. HOLMEN
NATIONAL ASSOCIATION OF REALTORS®
430 North Michigan Avenue
Chicago, IL 60611-4087

KAREN C. BENNETT
NATIONAL MINING ASSOCIATION
101 Constitution Avenue, NW
Washington, DC 20001
(202) 463-2600

QUESTIONS PRESENTED

1. May Petitioners seek pre-enforcement judicial review of the Administrative Compliance Order pursuant to the Administrative Procedure Act, 5 U.S.C. § 704?

2. If not, does Petitioners' inability to seek pre-enforcement judicial review of the Administrative Compliance Order violate their rights under the Due Process Clause?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

STATUTES

REGULATIONS

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICI CURIAE*

This case concerns whether judicial review is available when the government asserts that it has jurisdiction to act under the Clean Water Act ("CWA"). *Amici* represent a broad cross-section of industry interests, including mining and energy, road builders, landowners, fertilizer companies, and commercial and residential real estate interests. *Amici* are frequently subject to jurisdictional determinations issued by the U.S. Army Corps of Engineers ("Corps") and the U.S. Environmental Protection Agency ("EPA") under the CWA, and, as such, *amici* have a vital interest in this and other cases addressing the CWA.[1]

The American Petroleum Institute represents over 480 members engaged in exploration, production, refining, marketing, transportation, and distribution of petroleum products.

The American Road & Transportation Builders Association's membership includes public agencies and private firms and organizations that own, plan, design, supply, and construct transportation projects throughout the country.

---

[1] Pursuant to Rule 37.6 of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief. The letters of consent have been filed with the Clerk of Court. In addition, counsel for *amici* has filed a letter with the Court requesting to lodge materials cited in this brief that are not readily available from public sources pursuant to Rule 32.

The Building Owners and Managers Association International's members are building owners, managers, developers, leasing professionals, medical office building managers, corporate facility managers, asset managers, and the providers of the products and services needed to develop and operate commercial properties.

CropLife America's member companies produce, sell, and distribute virtually all the crop protection and biotechnology products used by American agricultural producers.

The Fertilizer Institute represents the fertilizer industry's producers, manufacturers, retailers, trading firms, and equipment manufacturers.

The Foundation for Environmental and Economic Progress is a national coalition of large landholding companies that own significant amounts of land in 44 states.

The International Council of Shopping Centers has over 47,000 members in the United States alone and represents the interests of shopping center owners, developers, managers, investors, lenders, retailers, and other professionals in the retail real estate industry.

The National Association of Real Estate Investment Trusts represents real estate investment trusts and other real estate businesses that own, operate, and finance commercial and residential real estate.

The National Association of REALTORS® represents persons engaged in all phases of the real estate business, including, but not limited to, brokerage, appraising, management, and counseling.

The National Mining Association's members produce most of America's coal, metals, and industrial and agricultural minerals. Its membership also includes manufacturers of mining and mineral processing machinery and supplies, transporters, financial and engineering firms, and other businesses involved in the nation's mining industries.

The National Multi Housing Council ("NMHC") represents the interests of the larger and most prominent apartment firms in the United States. NMHC's members are engaged in all aspects of the apartment industry, including ownership, development, management, and financing.

The Utility Water Act Group ("UWAG") is a voluntary, ad hoc group of 171 energy company systems that own and operate over fifty percent of the nation's total electric generating capacity. The individual energy companies operate power plants and other facilities that generate, transmit, and distribute electricity to residential, commercial, industrial, and institutional customers. UWAG members also include the Edison Electric Institute, the National Rural Electric Cooperative Association, and the American Public Power Association.

For the reasons given below, *amici* respectfully urge the Court to hold that regulated parties have a right to immediately challenge the agencies' imposition of jurisdiction under the CWA.

SUMMARY OF ARGUMENT

At the heart of this case is the threshold question of whether the agencies have authority under the CWA to impose regulatory control over Petitioners' land. But Petitioners here are just two of many thousands of regulated parties that annually are

subjected to the agencies' imposition of CWA jurisdiction through a variety of regulatory tools. Although the agencies have taken extremely broad positions regarding their jurisdiction under the CWA—positions that have been repeatedly rejected by this Court—most regulated parties have been effectively prohibited from challenging the agencies' jurisdictional determinations in court. This lack of judicial oversight has enabled jurisdictional creep under the CWA, despite this Court's prior admonitions. As a matter of sound statutory interpretation, sensible CWA policy, and fundamental fairness to regulated parties, this Court should hold that a jurisdictional determination under the CWA, including in the context of an administrative compliance order ("ACO"), is judicially reviewable.

BACKGROUND

When Congress adopted the CWA in 1972, it authorized the agencies to regulate the discharge of pollutants into "navigable waters," which the statute defines to mean "the waters of the United States, including the territorial seas." 33 U.S.C. §§ 1251, 1344, 1362(7). In 1977, the Corps adopted regulations to define "the waters of the United States," EPA adopted similar regulations in 1980, and the definition remains essentially unchanged today.[2] Even under this broad regulatory definition, which the Corps described as incorporating *all* waters that

[2] *See* 42 Fed. Reg. 37,122 (July 19, 1977); 33 C.F.R. pt. 328; 45 Fed. Reg. 85,336 (Dec. 24, 1980); 40 C.F.R. pt. 230. The regulations define the agencies' jurisdiction to include navigable and tidal waters, tributaries, certain wetlands, impoundments, and all other waters "the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. § 328.3(a)(3); 40 C.F.R. § 230.3(s)(3).

could be regulated pursuant to the Commerce Clause, 42 Fed. Reg. at 37,144 n.2, the agencies recognized that many waters were outside the scope of their jurisdiction.[3] But since that time, proceeding largely case-by-case and occasionally by using "guidance," the agencies have "stretched the term 'waters of the United States' beyond parody." *Rapanos v. United States,* 547 U.S. 715, 734 (2006) (plurality opinion).

At the same time, regulated parties generally have been unable to challenge the agencies' overreaching. Over time, the agencies have eschewed notice and comment rulemaking as they stretched their jurisdiction, thus depriving the regulated community of the ability to comment on and ultimately gain judicial review of rules defining jurisdiction. And when regulated parties have attempted to challenge agency guidance or case-by-case jurisdictional claims in court, the agencies have persuaded the lower courts that such jurisdictional claims are unreviewable. "Guidance" is argued to be non-binding and therefore immune from review, and case-by-case claims are characterized as "preliminary" and likewise immune. In this way, the agencies largely have insulated themselves from judicial oversight. This case provides the Court an opportunity to ensure that there is an effective judicial check in the system, as Congress intended.

---

[3] *See* 45 Fed. Reg. 33,290, 33,398 (May 19, 1980) (preamble) ("[S]mall, isolated wet areas may not be waters of the United States . . . because . . . their destruction or degradation would not have any effect on interstate commerce."); *see also, e.g.,* EPA, *Decision of the General Counsel on Matters of Law Pursuant to 40 C.F.R. § 125.36(m)* (Sept. 18, 1975) (creek in Ely, Nevada not jurisdictional).

I. Administrative Theories of Jurisdiction Under the Clean Water Act

This Court has reviewed the scope of CWA jurisdiction three times, and twice in the last decade has rejected the agencies' overbroad jurisdictional theories. Despite this Court's admonitions, the agencies continue to advance overly expansive positions.

A. The "Anywhere a Bird Can Land" Theory

In 1985, the Court, in its first case addressing the proper interpretation of "the waters of the United States," upheld the agencies' interpretation that the CWA covers wetlands that actually abut a traditional navigable waterway. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985). Critical to the Court's finding was that the agencies' position on jurisdiction was based on an extensive rulemaking record. Deferring to "the Corps' and EPA's technical expertise," the Court found that the "Corps' conclusion that adjacent wetlands are inseparably bound up with the 'waters' of the United States" was reasonable. *Id.* at 134. The Court expressly declined to rule on whether federal jurisdiction extends to *isolated* waters (*i.e.*, wetlands and other waters that are not adjacent to navigable waters). *Id.* at 131 n.8.

Instead of engaging in rulemaking to address the open question of isolated waters, however, the agencies—in a pattern that has repeated itself time and again—developed a new legal theory behind closed doors. They announced that theory in 1985 through a legal memorandum prepared by EPA's general counsel. The memorandum declared that

use by birds could establish the requisite Commerce Clause nexus to establish CWA jurisdiction over remote waters.[4] Accordingly, the memorandum concluded, waters that could be used by migratory birds are "waters of the United States." The Corps then, in the preamble to a 1986 Federal Register notice, said that EPA's memorandum had "clarified" that the waters of the United States include waters that "are or would be used as habitat" by "[i] birds protected by Migratory Bird Treaties, or … [ii] other migratory birds which cross state lines." 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986).

Through this bird test, the agencies claimed jurisdiction over literally any "water," no matter how small or how far removed from interstate or navigable waters, if the water was used or could be used by birds that cross State lines. "Use" meant any kind of use, including a brief landing. Thus, virtually no area was excluded from CWA jurisdiction because, of course, birds can land anywhere. Indeed, the migratory bird theory was so all-encompassing that it obviated the need for the agencies to even refer to their regulations to impose jurisdiction.

A study conducted by the Corps in 1995 documented the breadth of the bird test in establishing federal jurisdiction over remote wetlands. The study was undertaken to determine the number and acreage of isolated wetlands that were less than one-half

---

[4] *See* Memorandum from Francis S. Blake, Gen. Counsel, EPA, to Richard E. Sanderson, Acting Assistant Adm'r, EPA, "Clean Water Act Jurisdiction over Isolated Waters" (Sept. 12, 1985). This theory came to be known as the "Migratory Bird Rule," but it was never adopted through Administrative Procedure Act ("APA") rulemaking.

acre in size—*i.e.*, areas that would likely not be jurisdictional but for the bird test. Looking at 41 states, the study identified 8,309,502 discrete isolated wetlands smaller than half an acre; they averaged one-quarter acre in size. Thus, under the bird test, more than eight million isolated wetlands were subject to federal regulation because they could be used by birds.[5]

Regulated parties attempted to challenge the bird theory in court, but as discussed below, their cases generally were dismissed on procedural grounds and never reached the merits. One case that did reach the merits, *Tabb Lakes, Ltd. v. United States,* No. 89-2905, 1989 WL 106990 (4th Cir. Sept. 19, 1989), held that the bird test was invalid because it had not been adopted in accordance with APA notice and comment requirements. In response, the Corps and EPA headquarters issued guidance stating that the "decision was incorrect."[6] Furthermore, because the case was "limited to the procedural notice-and-comment issue," the agencies "expect[ed] [field] offices . . to continue to regulate isolated waters"—even within the Fourth Circuit. *Tabb Lakes* Guidance ¶ 5. The guidance also stated that the agencies would undertake a rulemaking to address jurisdiction over isolated waters "as soon as possible." *Id.* ¶ 2. No such rulemaking was ever proposed.

---

[5] U.S. Army Corps of Eng'rs, 1995 Wetlands Delineation Field Evaluation Forms (June 1995).

[6] Memorandum from John Elmore, Dep't of the Army, Directorate of Civil Works, & David Davis, EPA, Office of Wetlands Protection, "Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of *Tabb Lakes v. United States*," ¶ 3 (Jan. 24, 1990) ("*Tabb Lakes* Guidance").

The migratory bird theory thus dominated the jurisdictional landscape until *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs,* 531 U.S. 159 (2001) ("*SWANCC*"). *SWANCC* considered the Corps's determination that it had jurisdiction over small isolated ponds that were created when rain fell at an abandoned sand and gravel pit because birds used the ponds. In rejecting jurisdiction over these ponds—and the migratory bird theory more generally—the Court explained that the CWA's use of the term "navigable waters" demonstrates Congress's understanding that its authority for enacting the CWA was its "traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id.* at 172. As such, the Court found that the Corps's attempt to assert jurisdiction over isolated waters because they were used as habitat by migratory birds was "a far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends." *Id.* at 173. The Court further explained that it was the "significant nexus" between the wetlands and the "navigable waters" to which they abutted that informed its reading of the CWA in *Riverside Bayview*, and that *Riverside Bayview* did not establish that the Corps's jurisdiction "extends to ponds that are *not* adjacent to open water." *Id.* at 167-68 (emphasis in original).

B. The "Any Connection" Theory

Rather than heed *SWANCC*'s reasoning, the agencies attempted to side-step *SWANCC* by claiming that the Court's decision dealt solely with "iso-

lated" waters.[7] If a water was not "isolated"—if it connected in any way to navigable waters—the agencies claimed that the water could be regulated as a "water of the United States." Thus was born the "any connection" theory of jurisdiction.

This theory *expanded* the agencies' jurisdiction. Ditches, previously excluded from jurisdiction,[8] became the "connection" of choice. Farm ditches, roadside ditches, flood control ditches—all common across the American landscape—became "tributaries," a term undefined in the regulations. These ditches provided the "connection" so that upstream areas previously considered "isolated" and therefore regulable only under the bird theory could nonetheless be deemed "waters of the United States." Like the migratory bird test that preceded it, the "any connection" theory reached all wet areas, no matter how small or remote, because, as a matter of basic science, all water is connected to all other water through the hydrological cycle.

In California's Central Valley, for example, the Corps had determined prior to *SWANCC* that two cattle waste ponds were waters of the United States because they were used by migratory birds, and that a nearby farm ditch was non-jurisdictional.[9] After

---

[7] Memorandum from Gary S. Guzy, Gen. Counsel, EPA, & Robert M. Anderson, Chief Counsel, U.S. Army Corps of Eng'rs, to Distribution, "Supreme Court Ruling Concerning CWA Jurisdiction Over Isolated Waters" (Jan. 19, 2001) (providing the agencies' interpretation of *SWANCC*), *available at* http://www.spn.usace.army.mil/regulatory/misc/swancc.pdf.

[8] *See* 40 Fed. Reg. 31,320, 31,321, 31,324-25 (July 25, 1975); 42 Fed. Reg. at 37,127, 37,144.

[9] Letter from Justin Cutler, Project Manager, Delta Office, U.S. Army Corps of Eng'rs, Sacramento Dist., to James Gibson, Gib-

SWANCC, the property owner asked the Corps to disclaim jurisdiction over the ponds, only to be told that the ditch was now a tributary subject to jurisdiction, and, thus, the waste ponds remained jurisdictional—this time because they were "adjacent" to a tributary.[10]

The agencies' attempts to expand jurisdiction in the face of *SWANCC* did not go unnoticed. A 2004 study by the General Accounting Office documented numerous instances post-*SWANCC* in which Corps districts used underground drain tiles, storm drain systems, pipes, and even sheet flow (*i.e.*, rainfall runoff moving across the landscape) to establish a hydrological connection to recapture jurisdiction over otherwise isolated features.[11]

A good example is desert washes. These washes are not wetlands. They are commonplace drainages, pervasive across the Western landscape, which carry water only during occasional rainfalls. They often run only a few feet before they disappear from the surface, and most lack any surface connection to any true navigable water, even when it rains. At one 1,800-acre site in Arizona, for example, the

---

son & Skordal (Aug. 24, 2000) at 1; Letter from James Gibson, Gibson & Skordal, to Justin Cutler, Project Manager, Delta Office, U.S. Army Corps of Eng'rs, Sacramento Dist. (Aug. 17, 2000) at 3.

[10] Letter from Michael Jewell, Chief, California/Nevada Section, U.S. Army Corps of Eng'rs, Sacramento Dist., to James Gibson, Gibson & Skordal (Aug. 13, 2001) at 1.

[11] U.S. GEN. ACCOUNTING OFFICE, GAO-04-297, WATERS AND WETLANDS: CORPS OF ENGINEERS NEEDS TO EVALUATE ITS DISTRICT OFFICE PRACTICES IN DETERMINING JURISDICTION, 24-26 (Feb. 2004), *available at* http://www.gpoaccess.gov/gaoreports.

Corps claimed jurisdiction over 43 discrete drainageways, including one that was one-half inch deep, 10 feet wide, and 100 feet long.[12] Sixteen of these drainages were less than five inches deep and seventeen were less than five feet wide.[13] Similarly, in Orange County, California, the Corps asserted jurisdiction over hillside gullies one foot wide by forty feet long.[14]

C. Jurisdictional Theories Post-*Rapanos*

The "any connection" theory did not last. In 2006, the Court considered this theory in the consolidated cases of *Rapanos v. United States* and *Carabell v. United States*, 547 U.S. 715 (2006) ("*Rapanos*"). In both cases, the agencies claimed jurisdiction because the sites at issue were connected tenuously to downstream navigable waters.

The Court emphatically rejected the agencies' any connection theory. The plurality decried the Corps's "'Land is Waters' approach to federal jurisdiction." *Id.* at 734 (plurality opinion). Justice Kennedy's concurrence likewise criticized the agencies' broad standard for leaving "wide room for regulation of drains, ditches and streams remote from any navi-

---

[12] Appendix to Brief of The Serrano Water District, *et al.* as *Amici Curiae* in Support of Petitioner, at Ex. 10, Summary of U.S. Army Corps of Eng'rs Delineation of Ephemeral Drainages in Arizona, *SWANCC*, 531 U.S. 159 (2001) (No. 99-1178).

[13] *Id.*

[14] Appendix to Brief of The Serrano Water District, *et al.* as *Amici Curiae* in Support of Petitioner, at Ex. 4, U.S. Army Corps of Eng'rs Delineation of Site in Orange County, Cal., and Ex. 5, Ground-Level Photo of Jurisdictional Ephemeral Drainages in Ex. 4, *SWANCC*, 531 U.S. 159 (2001) (No. 99-1178).

gable-in-fact water and carrying only minor water volumes towards it," ultimately reaching wetlands "little more related to navigable-in-fact waters" than the isolated ponds in *SWANCC*. *Id.* at 781-82. The Justices unanimously agreed, moreover, that a rulemaking might have avoided this result, and invited the agencies to engage in rulemaking going forward. *See, e.g., id.* at 726 (plurality opinion); *id.* at 758 (Roberts, C.J., concurring) ("Rather than refining its view of its authority" through rulemaking, "the Corps chose to adhere to its essentially boundless view of the scope of its power. The upshot today is another defeat for the agency."); *id.* at 782 (Kennedy, J., concurring); *id.* at 812 (Breyer, J., dissenting) (calling for the agencies "to write new regulations, and speedily so").

But five years later, the agencies continue to exert jurisdiction ad hoc and by ever-changing guidance applied on a case-by-case basis. In fact, EPA and the Corps have proposed, and intend to finalize imminently, new CWA guidance that purports to define waters that are jurisdictional under the CWA.[15] The Draft Guidance once again takes an aggressive view of the agencies' jurisdiction, despite the loud call from this Court to cut back.

For example, after *Rapanos*, the agencies interpreted "the waters of the United States" to include "relatively permanent, standing or flowing bodies of water." *Id.* at 732 (plurality opinion). The Court had noted that the "relatively permanent" standard did

---

[15] U.S. EPA & U.S. Army Corps of Eng'rs, "Draft Guidance on Identifying Waters Protected by the Clean Water Act," (May 2, 2011), *available at* http://www.water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm ("Draft Guidance").

not "necessarily exclude *seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months -- such as [a] 290-day, continuously flowing stream . . . Common sense and common usage distinguish between a wash and seasonal river." *Id*. at 732 n.5 (emphasis in original).

In their first post-*Rapanos* guidance, however, the agencies misconstrued the "relatively permanent" standard, claiming that it would be satisfied whenever a water flows "at least seasonally (e.g., typically three months)." Thus, the Court's 290-day example of waters "not necessarily excluded" morphed into a 90-day standard for waters always included.[16] The most recent Draft Guidance abandons even the three-month standard, requiring only "seasonal flow" and noting that "the time period constituting 'seasonal' will vary across the country."[17]

In addition, the *Rapanos* concurrence explained that wetlands are jurisdictional if they "alone or in combination with similarly situated lands in the region" have a significant nexus to traditional navigable waters. *Rapanos*, 547 U.S. at 780. Absent more specific regulations, the concurrence said, the agencies would be required to determine

---

[16] U.S. EPA & U.S. Army Corps of Eng'rs, "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States*" at 6-7 (June 5, 2007), *available at* http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm.

[17] Draft Guidance at 13. For additional examples of the agencies misconstruing *Rapanos* to expand CWA jurisdiction, see the discussion of "traditional navigable waters" in Brief of American Petroleum Institute, *et al.* as *Amici Curiae* Supporting Petitioners, *PPL Montana, LLC v. Montana*, No. 10-218, at 18-22 (U.S. Sept. 7, 2011).

case-by-case whether the individual wetland in question has a significant nexus. *Id.* at 782.

Sidestepping the call for case-by-case analysis, the Draft Guidance directs field staff to determine whether a particular water body has a significant nexus by aggregating the water at issue with all other "similarly situated" waters. If all those "similarly situated" waters, taken together, have a significant nexus to the nearest traditional navigable water, then the water in question will be deemed a water of the United States. Draft Guidance at 8.

In northern Arizona, for example, the criteria for aggregation set forth in the Guidance results in the aggregation of 17 million acres in the Little Colorado River watershed. Thus, jurisdiction over a wetland five miles from the Lower Colorado River will be decided by looking at a wetland 270 miles away.[18] If, in determining jurisdiction over one small wash in that watershed, the agencies are directed to aggregate all other washes in the 17 million acres, then it is inevitable that jurisdiction will be established, even though the wash in question may be hundreds of miles from a traditional navigable water and rarely if ever flow. Moreover, under the Draft Guidance, once jurisdiction is established for that one wash, jurisdiction will be presumed for all other washes in the watershed (although without notice to other affected landowners).

---

[18] *See* Waters Advocacy Coalition, *et al.*, Comments in Response to the Environmental Protection Agency's and U.S. Army Corps of Engineers' Draft Guidance on Identifying Waters Protected by the Clean Water Act, Ex. 8, Docket No. EPA-HQ-OW-2011-0409-3514 (July 29, 2011), *available at* http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0409-3514.

II. Lack of Judicial Oversight

This history of CWA jurisdiction teaches an important lesson: that the agencies take aggressive, and in many cases indefensible, positions on jurisdiction. They do so, moreover, using a variety of administrative tools. For example, in this case, Petitioners were subject to an ACO issued under 33 U.S.C. § 1319(a)(3). But ACOs are not the only means—and, indeed, not the most frequent means—through which the agencies determine their jurisdiction over particular land and water. Most notably, the Corps is authorized to issue "formal determinations concerning the applicability of the [CWA] to activities or tracts of land," which the Corps deems "final agency action." 33 C.F.R. § 320.1(a)(6). Such "formal determinations" include approved jurisdictional determinations ("AJDs"). 33 C.F.R. § 331.2; U.S. Army Corps of Engr's, Regulatory Guidance Letter No. 08-02, Jurisdictional Determinations (June 26, 2008) ("RGL 08-02"), *available at* http://www.usace.army.mil/cecw/pages/rglindx.aspx.

Regulated parties have sought judicial review of jurisdictional determinations made through ACOs, AJDs, and other means under the CWA. But they have been rebuffed by courts. These courts have reasoned that ACOs and AJDs are not "final agency action" under the APA, and/or that their review is impliedly precluded by the CWA.[19] For the reasons

---

[19] *See, e.g.*, *S. Pines Assocs. v. United States*, 912 F.2d 713, 717 (4th Cir. 1990) (denying ACO review); *Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564, 566 (10th Cir. 1995) (same); *Hoffman Group, Inc. v. EPA*, 902 F.2d 567, 568 (7th Cir. 1990) (same); *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 593 (9th Cir. 2008), *cert. denied*, 129 S.Ct. 2825 (2009) (denying AJD review).

described below, these cases misinterpret the law and ignore the reality that ACOs and AJDs are—both by design and in effect—conduct-altering regulatory tools.

Without judicial review of an ACO or AJD, regulated parties can get judicial review of a jurisdictional determination only by (a) proceeding through the expensive and time-consuming permitting process, obtaining a permit decision, and then challenging jurisdiction; or (b) ignoring the jurisdictional determination and proceeding with development, exposing themselves to massive daily penalties, and waiting on the government, whenever it wishes, to bring an enforcement action. As a practical matter, the price of these "alternatives" is so high that, in many cases, the prospect of judicial review is illusory.

By contrast, environmental groups have long been able to obtain immediate judicial review of agency jurisdictional claims that they question. *See, e.g., Golden Gate Audubon Soc'y, Inc. v. U.S. Army Corps of Eng'rs*, 717 F. Supp. 1417 (N.D. Cal. 1988); *National Wildlife Fed'n v. Hanson*, 623 F. Supp. 1539 (E.D.N.C. 1985). Thus, as it now stands, judicial review of jurisdictional determinations is a one-way ratchet—failing to check the agencies when they go too far, but, with the prospect of environmental lawsuits a constant part of the mix, pushing them to go further than Congress intended the CWA to reach.

ARGUMENT

This case comes to the Court in the form of an ACO. But the threshold question in this and every CWA case—regardless of the regulatory tool the agencies choose to employ—is whether the agencies

have the jurisdiction to act in the first place. The Court should hold that this threshold jurisdictional determination, whether in an ACO or AJD, is subject to judicial review.

ACOs and AJDs are not, as some courts have held, mere preliminary assessments of jurisdiction without sufficient consequence to support judicial review. To the contrary, they are consummated agency actions that are designed to—and in fact do—fundamentally alter the day-to-day conduct of citizens who receive them. Thus, ACOs and AJDs are "final agency action" judicially reviewable under the APA. Moreover, there is nothing in the CWA—much less clear and convincing evidence—suggesting that Congress intended to preclude judicial review of ACOs or AJDs. Indeed, far from being inconsistent with the CWA, judicial review would help to ensure that Congress's intention with regard to CWA jurisdiction, as reflected in this Court's decisions, is respected.

I. A Jurisdictional Determination Issued Through an Administrative Compliance Order or an Approved Jurisdictional Determination Is Judicially Reviewable.

The APA creates "'generous review provisions' [that] must be given a 'hospitable' interpretation.'" *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967) (internal citations omitted). The APA creates a right to judicial review of all "final agency action," unless judicial review is precluded by statute. 5 U.S.C. §§ 701(a), 704. The test for "final agency action" is intended to be "pragmatic" and "flexible"—not mechanically applied. *Abbott Labs.*, 387 U.S. at 149-50;

FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 239 (1980).

Courts generally look at two factors in determining whether there is "final agency action." First is *finality*: the action must "consummat[e]" the agency's decisionmaking process. *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997). Second is *effect*: the action must have an "effect on the day-to-day business of the party challenging it." *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1278 (D.C. Cir. 2005) (internal quotation marks and citations omitted).

A. Administrative Compliance Orders and Approved Jurisdictional Determinations Consummate Agency Action.

Agency action is "consummat[ed]" when it concludes a distinct administrative act. The action "must not be of a merely tentative or interlocutory nature." *Spear*, 250 U.S. at 178. Instead, it must represent the "complet[ion]" of a "decisionmaking process." *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992).

An ACO represents the "consummation" of an agency action. In order for an ACO to issue, the EPA Administrator must "*find[]*" based on the evidence available that there has been a "*violation*" of the CWA. 33 U.S.C. § 1319(a)(3) (emphasis added). Thus, by statute, EPA must consider the evidence and finally conclude that (a) there are "waters of the United States" present; and (b) the regulated party has violated the CWA. The ACO in this case, in fact, could not be clearer about its finality. *See* Pet'rs' App. G-1 to G-4 ¶¶ 1.1-1.14 (containing 14

"FINDINGS AND CONCLUSIONS," including a finding that there are jurisdictional waters on the property).[20]

Similarly, an AJD represents the "consummation" of the agencies' decisionmaking process. As the regulations make clear, an AJD—unlike a preliminary jurisdictional determination ("PJD")—is a *final* and *approved* determination that the agencies have CWA jurisdiction. 33 C.F.R. § 331.2 (defining an AJD as a "Corps document stating the presence or absence of waters of the United States on a parcel" and PJDs as "written indications that there may be waters of the United States on a parcel"). "[A]n [AJD] is an official Corps determination that jurisdictional [waters under the CWA] are either present or absent on a particular site." RGL 08-02 at 1; 33 C.F.R. § 320.1(a)(6) (AJD is "final agency action"). Thus, an AJD is the agency's "'last word' on whether it views the property as a wetland subject to regulation under the CWA" and thus represents the "consummation" of the decisionmaking process. *Fairbanks N. Star Borough*, 543 F.3d at 593.

The fact that some regulated parties may proceed to the permitting process after obtaining a posi-

---

[20] Some courts holding that an ACO is "non-final" under the APA have wrongly analogized an ACO to the administrative complaint held to be non-final in *Standard Oil*. 449 U.S. at 241. But the administrative complaint there was based on a mere "reason to believe" there had been a violation and its sole purpose was to start further "adjudicatory proceedings." *Id.* By contrast, an ACO issued under the CWA must be based on an actual "find[ing]" of a CWA violation and operates like an injunction—not a mere complaint. 33 U.S.C. § 1319(a)(3). If anything, these differences demonstrate why ACOs *do* constitute final agency action.

tive AJD—and ultimately challenge jurisdiction after the permit decision—does not render the AJD non-final or otherwise support denying judicial review of an AJD. Finality is a function of an action's consummation, not its place in a potential administrative process. In fact, some landowners obtain an AJD for reasons other than development (*e.g.,* to determine land value), and thus have no need to go through the permitting process. If AJDs were deemed reviewable only after a permit decision, these landowners would be without a remedy to an erroneous jurisdictional determination. Moreover, for those wanting to engage in development, one purpose of an AJD is to determine *whether* they must go through the permitting process. It thus makes no sense to require these landowners to incur the cost and burden of the permitting process in order to gain judicial review of whether they should have been forced to go through that process in the first place.

B. Administrative Compliance Orders and Approved Jurisdictional Determinations Have the Requisite Effects.

The effects test focuses on whether the regulated party's operations are impacted by the agency action such that there is a concrete dispute in need of, and appropriate for, judicial resolution. *See, e.g., Sharkey v. Quarantillo*, 541 F.3d 75, 89 (2d Cir. 2008) ("The APA requirement of final agency action relates closely to the prudential doctrine of ripeness."). This Court in *Spear* described two effects that will satisfy this test: the agency action is "one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Spear*, 520 U.S. at 178 (internal citations omitted).

These elements, however, are not to be applied mechanically. Instead, they are meant to inform the fundamental, pragmatic inquiry: Has the agency made a "definitive" decision on some matter that "has a direct and immediate . . . effect on the day-to-day business of the party challenging it"? *Nat'l Ass'n of Home Builders,* 417 F.3d at 1278 (internal quotation marks and citations omitted). Here, the determination that jurisdiction exists, be it in an ACO or an AJD, satisfies this test because it defines the rights and obligations of regulated parties under the CWA, imposes the risk of sanctions, affects land values, halts further development, alters development choices, imposes delay, and affects investment.[21]

Both an ACO and AJD, by regulatory design, determine regulated parties' rights and obligations and alter their conduct. *See* 33 U.S.C. § 1319(a)(3) (authorizing an ACO after the EPA Administrator "find[s]" CWA jurisdiction and a violation of the CWA); 33 C.F.R. § 320.1(a)(6) (AJDs are "final agency action"). Indeed, the language of the ACO here leaves no doubt about its effects. After making a number of "FINDINGS AND CONCLUSIONS," the ACO "ORDERS" Petitioners to "remove all unauthorized fill material" and restore the land to its original

---

[21] *See, e.g., Alaska Dep't of Envtl. Conservation v. U.S. EPA*, 244 F.3d 748, 750 (9th Cir. 2001) (finding the requisite effects because the EPA orders were intended to and had the effect of "halt[ing] construction at Cominco's Red Dog Mine facility at a considerable cost of both time and money to Cominco"), *aff'd* 540 U.S. 461, 483 (2004); *Nat'l Ass'n of Home Builders*, 417 F.3d at 1280 (finding the requisite effects because the nationwide permits, "[e]ither . . . through increased delay or project modification, . . . directly affect[ed] the investment and project development choices of those whose activities are subject to the CWA").

condition to the extent practicable. Pet'rs' App. G-4 ¶ 2.1.

Failure to comply with an ACO, moreover, will subject the recipient to up to $37,500 in *daily* penalties. 33 U.S.C. § 1319(d).[22] In addition, if a regulated party continues work in the face of an ACO, the party greatly increases the chance that the government will seek, and the court will impose, civil and even *criminal* penalties for violating the CWA. 33 U.S.C. § 1319(c)(1)-(2) (imposing criminal penalties for negligent and knowing violations of the CWA); *see also Leslie Salt Co. v. United States*, 789 F. Supp. 1030, 1032 (N.D. Cal. 1991).[23] Similarly, ignoring a positive finding of jurisdiction in an AJD makes it more likely that a landowner will be found not to

---

[22] The Court of Appeals in this case reinterpreted the CWA to allow penalties only in the case of a *valid* ACO in order to avoid the due process violation that arises from exposing regulated parties to massive daily penalties without a hearing. *Sackett v. U.S. EPA*, 622 F.3d 1139, 1145 (9th Cir. 2010). But the canon of constitutional avoidance "has no application in the absence of statutory ambiguity." *Dep't of Housing & Urban Dev. v. Rucker*, 535 U.S. 125, 134 (2002) (internal quotation marks and citation omitted). Section 1319(d), which imposes penalties for violating "any order issued by the Administrator," unambiguously imposes penalties for violating an ACO, regardless of whether it is valid and above and beyond any penalties for violating the CWA.

[23] The risk of criminal and civil penalties is not theoretical. *See, e.g., United States v. Pozsgai*, 999 F.2d 719, 723 (3d Cir. 1993) (defendant sentenced to three years' imprisonment and fined $200,000 for depositing fill material onto land without CWA permit); *United States v. Ellen*, 961 F.2d 462, 464 (4th Cir. 1992) (environmental consultant sentenced to 6 months' imprisonment and one year of supervised release for supervising the filling of wetlands in connection with a wildlife sanctuary project).

have acted in "good-faith" and thus be subject to a higher civil penalty for violating the CWA. 33 U.S.C. § 1319(d); *cf. United States v. Key West Towers, Inc.*, 720 F. Supp. 963, 965-66 (S.D. Fla. 1989) (finding the "good-faith" factor "strongly compels the court to impose a substantial civil penalty" because the defendants filled wetlands in the face of a cease-and-desist order).

These potential penalties leave the regulated party effectively with no choice but to concede to the agencies' imposition of jurisdiction. *See Riverside Irrigation Dist. v. Stipo*, 658 F.2d 762, 767 (10th Cir. 1981) ("The defendants argue that plaintiffs could proceed with construction and test the validity of the Engineer's position by incurring the civil and criminal penalties. It is apparent however that this is an unrealistic position. . . . Thus his act effectively has prevented construction to this day."). And this imposition of jurisdiction, both by design and in effect, has a number of significant consequences as described below.

Altering Development Choices. Realistically, a jurisdictional determination often will cause the recipient to modify or even abandon its project. A jurisdictional determination draws a line on a map. On one side of the line, the land may be developed without a CWA permit; on the other, development is forbidden unless the owner obtains a permit. Obtaining a permit typically takes at least a year, costs hundreds of thousands of dollars, and requires the support of expert technical consultants (and often lawyers). *See* David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 NAT. RESOURCES J. 59,

74 (2002) (study concluding that the average applicant spent $271,596 ($337,577 in 2011 dollar values) to prepare an individual section 404 permit application and $28,915 ($35,954 in 2011 dollar values) to prepare a nationwide permit application). Thus, regulated parties must determine whether it is rational to traverse the permit process in light of the financial costs and delay. Many determine that it is not, and thus modify the project to avoid alleged jurisdictional waters, or just give up on development.

Avoidance, Minimization, and Mitigation. For those that can bear the cost and delay associated with applying for a CWA permit, the regulations also impose certain avoidance, minimization, and mitigation requirements.[24] Avoidance requirements involve leaving some portion of an area proposed for development in an undisturbed condition. *See* 40 C.F.R. § 230.10(a)(1). Unless other land is made available for development, avoidance requirements result in a net loss of developable land. The cost of avoidance (*i.e.*, development foregone) averages about $400,000 per acre in Southern California, and can be well over $1 million per acre in some cities.[25] In extreme cases, the avoidance requirement can render an entire project infeasible, or force the appli-

---

[24] In addition, applying for a permit under section 404 of the CWA triggers mandatory consultation with multiple state and federal agencies under, for example, the National Environmental Policy Act, the Endangered Species Act, the National Historic Preservation Act, and the CWA.

[25] David Sunding, *Review of EPA's Preliminary Economic Analysis of Guidance Clarifying the Scope of CWA Jurisdiction* at 3 (July 26, 2011) *available at* http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0409-3514 ("Sunding Analysis of EPA Guidance").

cant to move the project to another site. In the mining context, if the mineral resource is located in a jurisdictional area, the avoidance requirement may mean that the resource can never be extracted.

Minimization requirements mandate that permittees take steps to minimize potential adverse impacts. 40 C.F.R. § 230.10(d). Among other things, minimization requirements may force the permittee to change the location of the project, change the material to be discharged, control the material after the discharge, change the method of dispersion, change the technology used, or downsize the project to avoid adverse effects. *Id.* §§ 230.70-77.

Mitigation requirements obligate permittees to undertake compensatory actions (*e.g.,* restoration of existing degraded wetlands or creation of man-made wetlands). 40 C.F.R. § 230.91(c)(3). The cost of mitigation can be significant. For example, one form of compensatory mitigation is a mitigation bank, which is an aquatic resource area that has been restored, established, enhanced, or preserved by a party other than the permittee to provide compensation for unavoidable impacts to aquatic resources permitted under section 404. Permittees can purchase credits from a mitigation bank to meet their requirements for compensatory mitigation. Mitigation bank prices for seasonal wetlands are over $200,000 per acre in the Sacramento region. Sunding Analysis of EPA Guidance at 4.

Decreasing Land Value. Even for parties not in the development process—like property owners that obtain an AJD to determine land value—a positive jurisdictional determination has enormous consequences because it decreases land value. For

example, banks have called loans or demanded more collateral to secure a loan when it turned out that the mortgaged property was subject to CWA regulation. The CWA jurisdictional status of land is often not at all obvious, and indeed, wetland delineations by experienced delineators can lead to different results. Only an official determination by the Corps or EPA can establish whether land is (or is not) jurisdictional and define the boundaries of jurisdiction on the land. In one case in the Norfolk, Virginia, area, for example, the appraisal value of mortgaged land was reduced from over $32 million to less than $1 million when the Corps determined that the land contained "waters of the United States." Because of their effects on land values, ACOs and AJDs also can affect tax assessments, and trigger SEC reporting requirements under 17 C.F.R. § 229.103. *See, e.g., Bergen Cnty. Assocs. v. Borough of E. Rutherford*, 12 N.J. Tax 399, 403, 411, 418 (N.J. Tax Ct. 1992) (land that had been valued at $47,500,000 reduced to $2,029,800 based on determination that land included "waters of the United States").

For all these reasons, jurisdictional determinations through ACOs and AJDs are intended to—and in fact do—concretely alter the day-to-day conduct of regulated parties.[26] Because the whole point

[26] Courts that have declined to hold that the effects test is satisfied with respect to an AJD primarily have reasoned that an AJD merely expresses the agency's view of the CWA, and all legal effects flow from *the CWA itself*. *See Fairbanks N. Star Borough*, 543 F.3d at 593-94 (reasoning that the regulated party's "legal obligations arise directly and solely from the CWA"). The entire premise of this reasoning is off. Rights and obligations (other than constitutional ones) are always derived ultimately from statutes or regulations. Agencies, of course, "determine" their application in orders, rules, and other types of

of the APA is to allow parties impacted by a consummated agency action to challenge that action in court, nothing more is, or should be, required.

II. The Clean Water Act Does Not Preclude Judicial Review.

Although ACOs and AJDs are final agency action under the APA, a number of courts nevertheless have found judicial review impliedly precluded by the CWA. These courts ignore that an agency's exercise of jurisdiction over a citizen is an extraordinary act, and courts should not "lightly infer that Congress" intends to deprive citizens of a judicial check "against agency action taken in excess of delegated powers." *Leedom v. Kyne*, 358 U.S. 184, 190 (1958). Indeed, "[o]nly upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review" of agency action. *Abbott Labs.*, 387 U.S. at 141. No such evidence exists here.[27]

---

agency action. But this reality, flowing from the underlying structure of our administrative regime, does not mean that a party is somehow unaffected by agency action or imply that agency action is not "final" under the APA. *See*, *e.g.*, *Spear*, 520 U.S. at 177–78 (holding that a biological "opinion" that applied statutory standards was "final agency action").

[27] The decisions finding implied preclusion, like the Ninth Circuit's decision here, primarily involve ACOs. These decisions, as described above, are wrong. Moreover, there is no basis to find that the CWA impliedly precludes review of AJDs. Indeed, the primary reason that courts have found judicial review of ACOs impliedly precluded—that it would defeat the "choice" between issuing an ACO or initiating an enforcement proceeding provided by 33 U.S.C. § 1319(a)(3)—is absent with respect to AJDs.

At the outset, it bears emphasis that Congress has *not* included language in the CWA precluding review of ACOs under the APA as it has in other environmental statutes.[28] Congress's choice not to do so in the CWA should be respected, not ignored.

Nevertheless, the Court of Appeals stepped into the shoes of Congress and divined that Congress must have "*impliedly* preclude[d] judicial review" of ACOs. *Sackett*, 622 F.3d at 1143 (emphasis added). The Court of Appeals primarily reasoned that "Congress gave the EPA a choice of 'issuing an order requiring such person to comply with section or requirement, *or* . . . . bring[ing] a civil action [in district court].' 33 U.S.C. § 1319(a)(3) (emphasis added)." *Id.* at 1143. Thus, authorizing judicial review of ACOs "would eliminate th[at] choice by enabling those subject to a compliance order to force the EPA *to litigate all compliance orders in court*." *Id.* (emphasis added). This reasoning is not persuasive.

Section 1319(a)(3) does grant the Administrator an additional sword—an ACO—to compel compliance with the CWA without the need for litigation. But there is no reason to believe that Congress intended this additional sword in the hand of the government to remove a shield in the hand of the

---

[28] By contrast, Congress *explicitly* precluded judicial review of compliance orders in the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). *See* 42 U.S.C. § 9613(h). Congress's explicit preclusion of judicial review in CERCLA, moreover, is one example of why many courts have erred in relying on Clean Air Act and CERCLA cases denying review of ACOs to hold that Congress precluded review of ACOs issued under the CWA. Each of these statutes has a different text, structure, and purpose and thus each must be analyzed individually.

regulated party. The Court of Appeals seemed to be laboring under the assumption that the agencies will be "force[d] . . . to litigate all compliance orders in court." *Sackett*, 622 F.3d at 1143. Not so.

Only close cases or ones involving egregious agency action will be challenged. Even where there is a basis for challenge, moreover, the reality is that many parties lack the ability or desire to sue the federal government. This is especially true since going to court exposes the regulated party to the risk of monetary penalties. Thus, even where jurisdiction is questionable, a party in receipt of an ACO is strongly incentivized to negotiate a remedy with the agencies to avoid the risks, costs, and burdens of litigation, and to continue with the project. Thus, in most cases, an ACO will ensure compliance without the need for litigation, thus effectuating Congress's purpose in creating an administrative enforcement tool.

But this does *not* mean that Congress intended—in those cases where the agencies have stepped over the bounds—to foreclose the regulated party's ability to challenge the ACO in court. In other words, it would be perfectly sensible for Congress to provide a mechanism that could force compliance without the need for litigation in most cases, while still leaving intact the presumptive ability of a regulated party to judicial review in questionable cases. At least there is no clear and convincing evidence to the contrary.

Moreover, allowing judicial review of an ACO will not prohibit the agencies from swiftly "address[ing] environmental problems," or cause a flood of litigation that will disrupt CWA enforcement. *Sackett*, 622 F.3d at 1144. The disincentives noted

above will, in most cases, deter judicial challenges; in the minority of cases in which a regulated party does challenge an ACO, the courts are well able to implement measures (like requiring the regulated party to halt development) to protect the environment during the pendency of any challenge. Moreover, the marginal increase in cases resulting from the availability of judicial review will lead to more case law and thus better guidance to the regulated community, regulatory staff, and other stakeholders, all of whom now must "feel their way on a case-by-case basis." *Rapanos*, 547 U.S. at 758 (Roberts, J., concurring). In the long run, this will lead to *less* litigation as the regulated community and Corps field staff will better understand the metes and bounds of the CWA, and what it takes to comply with its mandates. And even if the availability of judicial review does result in some burden on the agencies, the very purpose of the APA is to "'reasonably protect private parties even at the risk of some incidental or possible inconvenience to, or change in, present administrative operations.'" *Diebold v. United States*, 947 F.2d 787, 795 (6th Cir. 1991) (quoting S. DOC. NO. 248, at 301, 79th Cong., 2d Sess. (1946)).

To the extent there is any ambiguity regarding whether the CWA prohibits review, that ambiguity should be resolved in favor of judicial review to avoid the serious due process concerns raised by precluding review of ACOs. *See Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 466 (1989). An ACO, as noted above, is self-executing: a violation of the ACO, even if there is no jurisdiction or violation of the CWA, is punishable by severe penalties. And, even if it is not self-executing—even if only *valid* ACOs are punishable—an ACO makes it more likely that a regulated

party will be exposed to severe civil and criminal penalties if it is later found to violate the Act. *See supra* at 23-24.

In this circumstance, due process is not satisfied by allowing judicial review of an ACO only (i) *after* the arduous permitting process or (2) *after* the regulated party violates the ACO and incurs massive penalties and *after* the government decides, at its discretion, to bring an enforcement proceeding. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 218 (1994) (explaining a delay in judicial review violates due process where "compliance is sufficiently onerous and coercive penalties sufficiently potent" so as to present an "intolerable choice" to the regulated party).[29]

There is no basis to find—much less clear and convincing evidence—that Congress impliedly precluded judicial review of ACOs or AJDs issued under the CWA.

* * * * * * *

The APA, CWA, and case law fully support that jurisdictional determinations through ACOs and AJDs are final agency action subject to judicial review. This conclusion also is supported by sound policy considerations.

---

[29] Even if a regulated party is successful in defending an enforcement action, moreover, it is likely to expend a considerable sum without any recovery of attorney fees or expenses. *See United States v. Marion L. Kincaid Trust,* 463 F. Supp. 2d 680, 696-97 (E.D. Mich. 2006) (denying defendant's motion for attorney fees and certain costs despite defendant's successful challenge to CWA jurisdiction).

Regulated parties have been and, if history is any guide, will continue to be subject to unwarranted impositions of jurisdiction under the CWA. When this occurs, regulated parties should not have to spend hundreds of thousands of dollars in the permitting process—or expose themselves to extraordinary penalties if and when the government brings an enforcement action—in order to be able to test the imposition of jurisdiction in court.

The presence of judicial review also is a disciplining mechanism that affects the regulatory choices of the agencies. As it now stands, there is no real threat of judicial review to restrain overly aggressive jurisdictional determinations. By contrast, where environmental groups perceive the agencies as not going far enough, they can challenge the agencies in court. The result is an unbalanced system of "checks and balances" that incentivizes agencies to take overly aggressive enforcement positions.

Finally, the purpose of the CWA is to protect "the waters of the United States"—*not* all waters *in* the United States. Allowing judicial review of ACOs and AJDs will ensure that the agencies do not reach beyond this more limited, but critical, mission. Allowing judicial review, moreover, will not pose a threat to the agencies' ability to protect "the waters of the United States." Most ACOs and AJDs will continue to go unchallenged, even if judicial review is available. Moreover, where there are judicial challenges to an ACO or AJD, the courts can impose requirements on regulated parties to protect the environment during the pendency of any suit.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

VIRGINIA S. ALBRECHT
Counsel of Record
DEIDRE G. DUNCAN
RYAN A. SHORES
KARMA B. BROWN
KERRY L. MCGRATH
HUNTON & WILLIAMS LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037
valbrecht@hunton.com
(202) 955-1500
Counsel for Amici Curiae

September 30, 2011